NO. 83-1083

in the Supreme Court of the United States

CHARLES SWEPENISER, a/k/a
CHARLIE FRIEDMAN, a/k/a
CHARLIE BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-286-Cr-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES SWEPENISER
AKA: CHARLES FRIEDMAN
AKA: CHARLIE BROWN,
Defendant.

REPORT OF UNITED STATES MAGISTRATE

The defendant Charles Swepeniser has filed a motion to dismiss the Indictment. The motion has been referred to the undersigned for preliminary consideration and report, pursuant to 28 U.S.C. §636 (b)(1)(B).

The Indictment in this case generally tracks the statutory language and contains all of the essential elements of the offenses charged in each count. *United States v. Cantu*, 557 F.2d 1173 (5 Cir. 1977); *United States v. McPhatter*, 473 F.2d 1356 (5 Cir. 1973).

Further, each count adequately informs the defendant of the offense he is charged with. *United States v. Carvin*, 555 F.2d 1303 (5 Cir. 1977); *United States v. Constant*, 501 F.2d 1284 (5 Cir. 1974).

The defendant also asserts that he has been denied due process by a three year delay between the alleged bank robbery and the return of the Indictment.

The sole Constitutional limit upon pre-accusation delay in prosecution of a criminal charge is the Fifth Amendment Due Process Clause. The Sixth Amendment guarantee of speedy trial has no application to the pre-accusation delay. *United States v. Lovaseo*, 431 U.S. 738 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

To prevail upon such a Fifth Amendment claim, the defendant must allege and prove substantial actual prejudice and intentional tactical delay by the government. *United States v. Avalos*, 541 F.2d 1100 (5 Cir. 1976).

The motion and supporting memorandum assert only that the facts in this case are "stale" and that the alleged "delay" could serve no other purpose than to secure an unfair advantage over the defendant, who, for no specified reason "today is not able to gain access to evidence or witnesses to defend his case."

Such conclusory and speculative allegations can form no basis for the relief sought. This motion does not establish the prima facie case required by Local Rule 10.H.2., and it is therefore the recommendation of

the Magistrate that it be denied, without evidentiary hearing.

Dated: July 5, 1982

/s/ Claudine H. Sorentino
UNITED STATES MAGISTRATE

cc: Alexander L. Martone, Esq.
United States Attorney

[RECEIVED APR 15 1983]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-286-CR-JWK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES SWEPENISER,
Defendant.

MEMORANDUM OPINION AND ORDER

In August, 1982, the Court conducted a jury trial in the above styled criminal action, at the close of which the jury found the Defendant guilty of violating 18 U.S.C. Appx. I, §1202(a)(1).[1] Currently pending before

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[1]The within indictment charges that the Defendant was convicted in 1962 by the United States District Court for the Southern District of Florida of the offense of bank robbery, which offense was and is a felony under the laws of the United States of America, and that he thereafter on or about June 15, 1979, did knowingly possess a firearm which had previously traveled in interstate commerce, in violation of 18 U.S.C. Appx. I, §1202(a)(1), which provides:

> "Any person who has been convicted by a Court of the United States or of a state or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm [shall be guilty of an offense against the United States.]"

the Court is the Defendant's timely motion for a new trial, filed September 7, 1982. After having thoroughly considered the aforementioned motion, as well as the Government's response thereto, the Court hereby denies the Defendant's motion for the reasons set out below.

On June 15, 1979, Agents Friel and Herbert came to the Defendant's residence and asked to speak with the Defendant privately. Whereupon the Defendant escorted the agents into his bedroom where they observed a pistol on a shelf at the head of the bed. Friel and Herbert testified that the Defendant, after having been advised of his *Miranda* rights told them that he was a convicted felon, and that the bedroom and house which they were in, as well as the pistol, belonged to him. The Defendant's wife, however, testified that she obtained the pistol on June 10, 1979, so as to be able to protect herself while her husband was away with their children on a four-day trip to Disneyworld. Mrs. Swepeniser testified that she placed the pistol on a shelf above the bed and that she did not inform her husband of the presence of the firearm upon his return from Disneyworld at about noon on June 14, 1979. The Defendant's mother testified that the Defendant left the house shortly after his return from Disneyworld and that he did not return until approximately 10:00 p.m. that evening, at which time he went to bed in the darkened bedroom where his sick son was already asleep.[2]

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[2]The Defendant's mother testified that the Defendant's son was not feeling well on June 14 after his return from Disneyworld, and that he went to sleep in his father's bed. Agents Friel and Herbert testified that the boy remained asleep in the bedroom on June 15 while they were speaking with the Defendant, who informed them that the boy had not been feeling well.

Upon leaving the Defendant's house on June 15, 1979, Friel and Herbert seized the firearm. Friel further testified that the Defendant called him approximately two hours later and requested the return of the firearm.

I. Sufficiency of the Evidence

When viewing the evidence and all reasonable inferences derived therefrom in a light most favorable to the Government, the Defendant's contention that the jury could not have found the evidence to be inconsistent with every reasonable hypothesis of innocence is without merit.[3] In particular the Defendant's argument that the Government failed to prove beyond a reasonable doubt that he, rather than his wife, possessed the pistol is easily disposed of by the Fifth Circuit's holding in *U.S. v. Smith*, wherein the court stated:

> "Like any other fact in issue, possession may be proved by circumstantial as well as direct evidence. The law also recognizes that possesion may be either actual or constructive. The defendant had constructive possession if he had the intent and the power to exercise dominion and control over the weapons as charged. . . . 'In order to establish constructive possession, the Government must produce evidence showing ownership, dominion, or control over the contraband itself or the premises or vehicle in which contraband is concealed.' . . . Smith's dominion and control over his

[3] *Glasser v. U.S.*, 315 U.S. 60, *rehearing denied* 315 U.S. 827 (1942); *U.S. v. Tolliver*, 665 F.2d 1005 (11th Cir. 1982); *U.S. v. Spradlen*, 662 F.2d 724 (11th Cir. 1981).

> own residence, in which the guns were found, is a sufficient basis for the jury's inference of constructive possession. The guns were either in plain view or in places where they could hardly have escaped his knowledge. Smith claims, however, that the Government has not disproved his contention that the guns were in the possession of his wife. In *U.S. v. Ransom*, 515 F.2d 885 (5th Cir.) *cert. denied* 424 U.S. 944 (1976), this court approved a charge containing the following statement: 'The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.' "

591 F.2d 1105, 1107 (5th Cir. 1979).

In the case at bar, as in *Smith*, the Defendant's dominion and control over his bedroom, where the pistol was found in plain view, provided the jury with a sufficient basis to infer that the Defendant had constructive possession of the firearm, either sole or joint, on June 15, 1979. *Accord, U.S. v. Stanley*, 597 F.2d 866 (4th Cir. 1979); *U.S. v. Scarborough*, 539 F.2d 331 (4th Cir. 1976), *affirmed* 431 U.S. 563 (1977); *U.S. v. Burnette*, 524 F.2d 29 (5th Cir. 1975) *cert. denied* 425 U.S. 939 (1976).

Similarly, the Defendant's admission that the pistol belonged to him was properly before the jury, inasmuch as the evidence of the Defendant's constructive possession

of the firearm, as discussed above, sufficiently bolstered the Defendant's admission so as to justify the jury's inference that the Defendant's admission was true. *See Smith v. U.S.*, 348 U.S. 147 (1954); *Opper v. U.S.*, 348 U.S. 84 (1954); *U.S. v. Micieli*, 594 F.2d 102 (5th Cir. 1979); *U.S. v. Evans*, 572 F.2d 455 (5th Cir.) *cert. denied* 439 U.S. 870 (1978).

II. The Court Did Not Err in its Evidentiary Rulings

The Defendant maintains that the Court improperly excluded reference to the Defendant's son's surgery some two weeks after the incidents of June 15, 1979, contending that such testimony was admissable under *Rule* 401, Federal Rules of Evidence, in that it tended to prove that the boy was in poor health and required rest upon his return from Disneyworld on June 14, 1979. The Defendant argues that this was a fact "of consequence," since it explained the darkness in the Defendant's bedroom where the boy was resting, which in turn, according to the Defendant's theory of the case, explained his ignorance of the fact that the pistol was in the room. Assuming the relevance of this evidence, the Court properly excluded it under *Rule* 403, Federal Rules of Evidence, since its probative value was outweighed by the danger of unfair prejudice to the Government, and where in any event, it was merely cumulative. *Cf., Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) ("[evidence] is unfairly prejudicial if it 'appeals to the jury's sympathies . . .' ").

The Court further finds that it properly excluded reference to the fact that the Defendant was not arrested until three years after the seizure of the pistol, inasmuch

as this discrete fact was totally irrelevant to the jury's determination of the guilt or innocence of the Defendant. *See Rules* 401 and 402, Federal Rules of Evidence.

Finally, the Defendant's contention that the Court erred in admitting Agent Friel's testimony that the Defendant telephoned him some two hours after he and Herbert seized the firearm on June 15, 1979, is without merit, inasmuch as this evidence was admissible to show the Defendant's knowledge of the gun and his intent to possess it. *See Rule* 404(b). Federal Rules of Evidence.

Accordingly, the Court hereby DENIES the Defendant's motion for a new trial.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 4/8/83

/s/ Charles H. Haden II
United States District Judge